IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 1872 OF 2006

VIJAY KIRTILAL MEHTA .. PETITIONER

Versus

STATE OF MAHARASHTRA .. RESPONDENT

Mr. Vinod Bobde with Mr. Shirish Gupte, Mr. S.G. Aney, Mr. Chetan Kapadia and Girish Kulkarni for petitioner

Mr. Nitin Pradhan i/b M.S. Mohite for applicant in Application No. 344/06

Ms. M.H. Mhatre, APP

CORAM:-SMT. RANJANA DESAI, J.

DATE ON WHICH THE JUDGMENT RESERVED: 8th NOVEMBER, 2006

DATE ON WHICH THE JUDGMENT DELIVERED: 8th DECEMBER, 2006

JUDGMENT:

. Rule. Returnable forthwith. Respondents waive service. By consent of the parties the petition is taken up for final hearing.

2. In this petition filed under Article 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure ("Code" for short), the

petitioner has challenged order dated 29/7/06 passed by the Metropolitan Magistrate's 9th Court, Bandra, Mumbai in C.C. No. 143/Misc./2006 and the order dated 8/8/2006 passed by the Sessions Court, Mumbai in Criminal Revision Application No. 856 of 2006.

3. The petitioner is the original complainant. He is the Managing Trustee of the Lilavati Kirtilal Mehta Medical Trust ("the Trust" for short). On 15/7/06 the petitioner filed a complaint before the Additional Chief Metropolitan Magistrate's, 9th Court, Bandra, against Mehul Janak Shah, Dilip Joshi, Prashant Mehta & Jayant Patel. In the complaint, the petitioner alleged that on or about 6/10/04, he along with other trustees and other persons received a notice dated 6/10/04 under Section 138 of the Negotiable Instruments Act from M/s. P.V. Nichani & Co., Advocates for one Atul Shah. From the contents of the notice, it appeared that the accused and others had approached Mr. Atul Shah for liasoning services with banks and financial institution for finance facility of Rs.3.3 Crores of one M/s. Hallmark Diamonds of which accused 1 to 4 appeared to be partners and/or responsible for the day to day affairs. The notice

further stated that the accused had handed over a cheque dated 6/9/04 for Rs.15 lacs drawn on an alleged account of the Trust with the City Union Bank, Khar (W) Branch, Mumbai under cover of the letter dated 3/6/04. The trustees were shocked by this notice because the Trust never had any account with the said Bank nor had the trust or any of its trustees ever dealt with Mr. Atul Shah and/or M/s. Acme Enterprises in any manner for any loan sought for by M/s. Hallmark Diamonds.

4. The Trust thereafter called upon the said advocates to furnish the copies of the alleged cheque and documents. On 7/10/04 the said advocates addressed another letter to the Trust inter alia stating that the matter has been settled and the said Atul Shah has returned the said cheque to accused 3.

5. These events indicate that the accused along with Mr. Kishor Mehta and others have created false and bogus accounts with the said bank and have also issued cheques of which the Trust had no knowledge and no obligation. It was apprehended that the accused may have encashed the cheque drawn in favour of the Trust in the said fraudulent

account, and thereby may have misappropriated the monies due to and legitimately receivable/belonging to the Trust. The Trust, therefore, through its advocates filed a complaint with the Addl. Commissioner Economic Offences Wing, Mumbai.

6. As the police did not take action, the petitioner filed the instant complaint for investigation of the complaint under Section 156(3) of the Code. On 15/7/05 the complaint was taken on record. The learned Magistrate kept it for verification on 29/7/05. The learned Magistrate passed the following order:

> . "Perused complaint. Complainant to examine himself under Section 200 of Cr.Pr. Code".

. On the Roznama following noting was made:

> . "Complainant present with Advocate. Keep for verification. Adj. to 14-8-06

7. Being aggrieved by this order, the petitioner preferred Criminal Revision Application No. 856 of 2006 in the Sessions Court at Mumbai. The said

revision application was dismissed. Though the learned Sessions Judge has discussed the merits of the case, he has held that the impugned order is an interlocutory order and hence a revision against the same is not maintainable. Being aggrieved by these orders, the present petition is filed.

8. I have heard Mr. Bobde, the learned Senior Counsel appearing for the petitioner at great length. Mr. Bobde drew my attention to paragraphs 15 and 16 of the complaint and contended that it is the case of the complainant that forged documents are used by the accused and hence they are required to be seized and sent to the expert. It is also averred in the complaint that the documents created and manufactured for the falsification of accounts are required to be investigated and concerned police station can collect the documents from various public authorities and persons. Mr. Bobde pointed out that it is also stated that the offences are serious and are done with the intention to harm the reputation of the complainant Trust and, therefore, it was necessary to send such complaint for investigation under Section 156(3) of the Code. Mr. Bobde further pointed out that the petitioner had specifically prayed that the matter

may be sent for investigation under Section 156(3) of the Code and the police may be directed to submit their report. Mr. Bobde submitted that the learned Magistrate, therefore, had no option but to send the complaint to the police for investigation and report under Section 156(3) of the Code.

9. Mr. Bobde contended that the learned Magistrate could not have ordered examination of the complainant under Section 200 of the Code. In this connection Mr. Bobde relied on the judgment of the Supreme Court in **Mohd. Yusuf v. Afaq Jahan (Smt.) & Anr., (2006) 1 SCC 627**. Mr. Bobde drew my attention to the observation of the Supreme Court that provisions of Section 190 of the Code cannot be read to mean that once a complaint is filed, a Magistrate is bound to take cognizance, if the facts stated in the complaint disclose the commission of any offence and that a complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under Section 156(3) of the Code to the police for investigation. Mr. Bobde relied on the observation of the Supreme Court that there is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable

offences is with the police. Mr. Bobde also laid stress on the further observation of the Supreme Court that there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence and, if he does so then he would have to proceed in the manner provided by Chapter XVI of the Code. Mr. Bobde contended that in the instant case there is nothing to show that the Magistrate has taken cognizance. Mr. Bobde stated that in the circumstances, the Magistrate should have sent the complaint for investigation under Section 156(3) of the Code and called for report.

10. Mr. Bobde contended that the Magistrate had no option but to refer the complaint for investigation under section 156(3) of the Code. But assuming that any discretion vests in him, he should have exercised it properly by sending the complaint for investigation under Section 156(3) of the Code. By ordering examination of the complainant the Magistrate has erred. It is a wrong exercise of discretion. In this connection Mr. Bobde relied on the judgment of the Supreme Court in **Commissioner of Police v. Gordhandas Bhanji, AIR (39) 1952 SC 16**. In that case the

Supreme Court was dealing with cancellation of license. The Supreme Court was concerned inter alia with Rule 250 of the Rules framed under the City of Bombay Police Act, 1902. The said Rule vested a discretion in the Commissioner regarding cancellation of licence. The Supreme Court came to a conclusion that the Commissioner did not in fact exercise his discretion and did not cancel the licence he granted. He merely forwarded to the respondent an order of cancellation which another authority had purported to pass. The Supreme Court observed that the Commissioner was bound to exercise his discretion and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the licence or reject the objections. The Supreme Court observed that the discretion vested in the Commissioner of Police has been conferred upon him for public reasons involving convenience, safety, morality and welfare of the public at large. The Supreme Court further went on to observe that an enabling power of this kind conferred for public reasons and for the public benefit is coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded. Mr. Bobde contended

that these observations of the Supreme Court are attracted to the present case. If discretion vests in the Magistrate to send the complaint for investigation and report under Section 156(3) of the Code, he should have exercised it.

11. Mr. Bobde also contended that the learned Sessions Judge erred in holding that the impugned order is an interlocutory order. In this connection he referred to the judgment of the Supreme Court in **Madhu Limaye v. State of Maharashtra, AIR 1978 SC 47** where the Supreme Court has observed that the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified and if it was so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397(2) of the Code. Mr. Bobde contended that the learned Sessions Judge overlooked the principles laid down in this case and wrongly held that the revision was not maintainable. Mr. Bobde contended that the order passed by the learned Sessions Judge is even otherwise illegal as he has adopted a wrong approach. Mr. Bobde urged that in the circumstances this court should set aside the

impugned orders and direct that the complaint be sent for investigation and report to the police in accordance with Section 156(3) of the Code.

12. Original accused 1 and 2 have filed an application for intervention. Mr. Pradhan, the learned counsel appearing for them contended that incorrect and false allegations are made against the accused in the instant petition. Order passed in this petition is likely to prejudicially affect the accused and hence in the interest of justice their intervention application be granted. In support of this submission Mr. Pradhan relied on two judgments of this court. They are **Suresh Ramteke v. State of Maharashtra & Anr., 2002 All M.R. (Cri.) 2230** and **Shriram s/o Nagordhar Mahajan v. State of Maharashtra & Anr., 2006 All M.R. (Crim.) 1311**. Since the applicants/accused are likely to be affected by the order passed in this petition. I am of the opinion that their intervention application needs to be granted. I have granted it accordingly.

13. Mr. Pradhan the learned counsel for the intervenors contended that the petitioners have not made out any case for interference with the

impugned order. Mr. Pradhan contended that Section 190 of the Code states when Magistrates can take cognizance of offences. Mr. Pradhan submitted that while entertaining a complaint a Magistrate has ample discretion either to act under Section 200 or under Section 156(3) of the Code and this discretion is not left at the fancy of the complainant. Mr. Pradhan contended that there is no legal bar which states that the Magistrate shall not send the complaint for investigation under Section 202(1) of the Code to a police officer and, therefore, the petitioners have really no valid grievance tenable in law. Mr. Pradhan submitted that the petition deserves to be dismissed. In support of his submissions, Mr. Pradhan relied on **Suresh Chand Jain v. State of M.P. & Anr., (2001) 2 SCC 628**, **CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd. & Anr. (2005) 7 SCC 467** and also on **Mohd. Yousuf's case (supra)**.

14. I have given anxious consideration to the submissions advanced by both sides. For better appreciation of the points involved in this case, it is necessary to have a look at the relevant provisions of the Code.

15. Section 2(d) of the Code defines complaint as under:

> . "2. **Definitions**. - In this Code, unless the context otherwise requires, -
>
> . (d) "complaint" means any allegation orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.
>
> . Explanation. - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

16. Section 156 falls in Chapter XII, which contains provisions for information to the police and their powers to investigate. Section 156 sets out the police officer’s power to investigate

cognizable case. It reads thus:

> "156. **Police officer's power to investigate cognizable case**. - (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."

17. Section 190 falls in Chapter XIV, which contains conditions requisite for initiation of proceedings. Section 190 reads as under:

190. **Cognizance of offences by Magistrates**. - (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

18. Chapter XV of the Code contains provisions relating to complaints to Magistrates. Section 200 so far as it is relevant reads as under:

> 200. **Examination of complainant**. - A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate".

Section 202 so far as it is relevant reads as under:

> "202. **Postponement of issue of process**. - (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, (and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction) postpone the issue of process against the accused, and

> either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

. Section 204 of the Code makes provisions for issue of process, if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding.

19. In **Gopal Das Sindhi & Ors. v. State of Assam & Anr., AIR 1961 SC 986**, the Magistrate had on receiving the complaint directed the police to register a case, investigate it and, if warranted submit a charge-sheet. It was urged on behalf of the appellants that the Magistrate acted without jurisdiction in directing the police to register a case, to investigate it and submit a charge-sheet. The Supreme Court repelled this contention. The Supreme Court held that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind i.e. ordering investigation under Section 156(3) or issuing a

search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. The Supreme Court further observed that the provisions of Section 190 do not mean that once a complaint is filed the Magistrate is bound to take cognizance, if the facts stated in the complaint disclose the commission of any offence. According to the Supreme Court, the word "may" in Section 190 cannot be construed to mean 'must'. The Supreme Court observed that a complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offence is with the police. The Supreme Court further observed that on the other hand there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. The Supreme Court further observed that if he does so then he would have to proceed in the manner provided by Chapter XVI of the Code.

20. In **Suresh Chand's case (supra)** the Magistrate had directed investigation under Section 156(3) of the Code. He had directed registration of F.I.R.

It was argued that on receipt of the complaint, the Magistrate should have examined the complainant in court before proceeding further. It was argued that he had no power to direct police to register F.I.R. The Supreme Court observed that the investigation directed under Section 156(3) can end up with the report filed by the police under Section 173 of the Code. It was further observed that investigation contemplated in Chapter XII can be commenced by the police even without the order of a Magistrate but that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation because it must also end with a report contemplated in Section 173 of the Code. According to the Supreme Court the significant point to be noted is when a Magistrate orders investigation under Chapter XII, he does so before he takes cognizance of the offence. The Supreme Court further observed that a Magistrate need not order any such investigation, if he proposes to take cognizance of the offence and once he takes cognizance of the offence, he has to follow the procedure envisaged in Chapter XV of the Code. The Supreme Court further observed that a reading of Section 202 (1) of the Code indicates that the investigation referred to therein is of a limited

nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such an investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The Supreme Court held that for the purpose of enabling the police to start the investigation it is open to the Magistrate to direct the police to register F.I.R. when directing investigation under Section 156(3).

21. In **Mohd. Yousuf's case (supra)** before the Allahabad High Court, there was a challenge to the order passed by the Chief Judicial Magistrate Rai Barelli, directing the police to register and investigate the case. The Allahabad High Court quashed the charge-sheet on the ground that the Magistrate had no power to order registration of the case. The Supreme Court set aside the High Court's order. The Supreme Court reiterated that provisions of chapter XII and Chapter XV deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. The Supreme Court observed that when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence and once

he takes cognizance of the offence he has to follow the procedure as envisaged in Chapter XV of the Code. According to the Supreme Court this investigation is done only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. Before the Magistrate takes cognizance he can order investigation under Section 156(3) and direct registration of offence. The Supreme Court then quoted its observations in **Gopal Sindhi's case** that Section 190 of the Code cannot be construed to mean that, if a complaint is filed, the Magistrate is bound to take cognizance, if facts stated in the complaint disclose commission of any offence. The Supreme Court further observed that a Magistrate may send it to the police for investigation or he may exercise his discretion to take cognizance of offence and, if he does so, he may have to proceed in the manner provided by Chapter XVI of the Code.

22. Following propositions emerge from the above judgments.

1) Under Section 190 of the Code an empowered Magistrate can take cognizance of an offence upon receiving a complaint

of facts which constitute such offence, upon a police report of such facts; and upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed.

2) Any Magistrate empowered under Section 190 may order an investigation of a cognizable case under Section 156(3). Such investigation must end up with a report submitted to the Magistrate under Section 173. A Magistrate orders this investigation before he takes cognizance of the offence.

3) A Magistrate has a discretion not to order any such investigation, if he proposes to take cognizance of the offence.

4) Once the Magistrate takes cognizance of the offence he has to proceed under Chapter XV of the Code.

5) He has to then examine the complainant

on oath and the witnesses present, if any and the substance of such examination has to be reduced to writing and has to be signed by the complainant and the witnesses and also by the Magistrate.

6) Under Section 202, the Magistrate may, if he thinks fit postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding.

7) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding he shall issue process under Section 204 of the Code.

23. In view of the above propositions, in my opinion, Mr. Bobde’s submission that no discretion vests in the Magistrate and that he ought to have proceeded under Section 156(3) of the Code and

ordered investigation and report must fail.

24. In this case though the petitioner has prayed that the matter may be sent for investigation under Section 156(3) of the Code, it is unmistakably a complaint. The petitioner has described himself as the complainant throughout the complaint. On 29/7/06 the Magistrate has noted that he has perused the complaint. He has further stated that "the complainant to examine himself under Section 200 of the Code on 15/7/06". It appears from the Roznama of 29/9/06 that the case was adjourned for verification. It is clear, therefore, that the Magistrate has taken cognizance. Mr. Bobde is not right when he says that there is nothing to indicate that the Magistrate had taken cognizance. The fact that the Magistrate perused the complaint and kept it for examination of the complainant is a sure indication that he has taken cognizance. In this connection it is useful to refer to the judgment of the Supreme Court in **CREF Finance Ltd.'s case (supra)**. In that case the Magistrate took cognizance and fixed the matter for recording statement of the complainant. The words 'cognizance taken' were not found in the order recorded by the Magistrate. The Supreme Court observed that that

would make no difference. The Supreme Court further observed that one should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process, held the Supreme Court, is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. Viewed in the light of these observations of the Supreme Court it must be held that in this case the Magistrate has taken cognizance.

25. Once it is held that the Magistrate has a discretion either to order investigation and report at pre-cognizance stage or take cognizance and record statement of the complainant, then the only question which needs to be examined is whether he could be faulted for having taken cognizance and ordered verification of the complaint in the instant case.

26. In my opinion, in the facts of this case, it cannot be held that the discretion has been wrongly

exercised by the Magistrate. In my opinion, judgment of the Supreme Court in **Mohd. Yousuf's case** does not help the petitioner. It is true that in that case the Supreme Court has expressed that a complaint disclosing cognizable offence may well justify a Magistrate in sending the complaint under Section 156(3) to the police for investigation and there is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. But the Supreme Court has further clarified that there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizance offence and then he would have to proceed under Chapter XVI of the Code.

27. Reliance placed by Mr. Bobde on **Gordhandas Bhanji's case (supra)** is also misplaced. Undoubtedly a discretion vests in the Magistrate either to proceed under Section 156(3) or take cognizance and record the complainant's statement and then proceed further. He has chosen to do the later. This is not a case where the Magistrate has refused to exercise his discretion. Besides as rightly observed by the Sessions Court the complaint is still pending and inquiry can still be ordered

under Section 202 of the Code. Therefore, no prejudice can be said to have been caused to the petitioner. It is wrong to presume at this stage that the learned Magistrate will not order inquiry under Section 202 if found necessary.

28. In view of the above, it is not necessary to deal with the question whether the Sessions Court was wrong in treating the impugned order as interlocutory order.

29. In the view that I have taken I find no substance in the petition. The petition is rejected.

JUDGE.